

SERVICE DATE – SEPTEMBER 25, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35147¹

NORFOLK SOUTHERN RAILWAY COMPANY, PAN AM RAILWAYS, INC.,
ET AL. – JOINT CONTROL AND OPERATING/POOLING AGREEMENTS – PAN AM
SOUTHERN LLC

Decided: September 24, 2008

In this decision, we vacate the remainder of the procedural schedule, which was published in the Federal Register on June 27, 2008 (June 27 Decision), to provide time for further environmental analysis. We also deny the request of the Committee to Improve Rail Service in Maine² (Committee) for a public hearing in Maine and deny the request of the Commonwealth of Massachusetts Executive Office of Transportation and Public Works (EOTPW), U.S. Clay Producers Traffic Association, Inc. (Clay Producers), and New England Southern Railroad Co. (NESR) (collectively, Joint Parties) for an oral argument.

BACKGROUND

In our June 27 Decision, we accepted for consideration the primary application and related filings submitted on May 30 2008, by Norfolk Southern Railway Company (Norfolk Southern), Pan Am Railways, Inc. (PARI) (a noncarrier holding company), and two of PARI's rail carrier subsidiaries, Boston and Maine Corporation (B&M) and Springfield Terminal Railway Company (Springfield Terminal) (collectively, Applicants). The application seeks our approval under 49 U.S.C. 11322 and 11323 of (1) the acquisition by Norfolk Southern and B&M of joint control and ownership of Pan Am Southern LLC (PAS), a new rail carrier to be formed;

¹ This decision also embraces Pan Am Southern LLC – Acquisition and Operation Exemption – Lines of Boston and Maine Corporation, STB Finance Docket No. 35147 (Sub-No. 1); Norfolk Southern Railway Company – Trackage Rights Exemption – Pan Am Southern LLC – Between Mechanicville, NY and Ayer, MA, STB Finance Docket No. 35147 (Sub-No. 2); and Springfield Terminal Railway Company – Trackage Rights Exemption – Pan Am Southern LLC – Between CPF 312 Near Willows, MA, and Harvard Station, MA, STB Finance Docket No. 35147 (Sub-No. 3) (collectively, the related filings).

² The Committee has filed two documents in this proceeding, referring to itself by slightly different names in each. See Petition and Comments for Conditions Imposed, filed Aug. 11, 2008 (“Committee to Improve Rail Service in Maine”) and Response to Comments and Amended Request for Condition, filed Sept. 5, 2008 (“Committee for Better Rail Service in Maine”).

and (2) the agreements by which Springfield Terminal would operate the lines of PAS and establish rates for PAS. (The agreements for which approval and authorization are being sought by the application and the related filings will be referred to collectively as the Transaction.) Also, in the June 27 Decision, we found the Transaction to be “minor” under 49 CFR 1180.2(c), and adopted a procedural schedule for consideration of the application, noting that the schedule would be subject to modification should the Board later determine that further environmental review is warranted.

On June 6, 2008, after consultation with the Board’s Section of Environmental Analysis (SEA), Applicants prepared an Environmental Appendix in support of their conclusion that the Transaction would not require formal environmental review by the Board under the National Environmental Policy Act of 1969, 42 U.S.C. 4321-43 (NEPA). In response, several parties filed comments expressing environmental concerns. In light of these concerns, Applicants consulted with SEA again and subsequently proposed that an Environmental Assessment (EA) be prepared that would address all relevant environmental issues raised by the Transaction.

By filings made on August 11 and September 5, 2008, the Committee requested that the Board hold a public hearing in Maine regarding the Transaction’s effect on certain service, car allocation and other issues. Also, on September 11, 2008, the Joint Parties³ filed an expedited request for oral argument. On September 15, 2008, the Brotherhood of Maintenance of Way Employees and Brotherhood of Railroad Signalmen (collectively, BMWE/BRS) filed in support of the Joint Parties’ request for oral argument, citing concerns regarding recently filed litigation in federal district court seeking the creation of a receivership for Springfield Terminal and B&M. Also, on September 15, 2008, Applicants filed a reply in opposition to the requests for oral argument.

DISCUSSION AND CONCLUSIONS

NEPA generally requires federal agencies to consider “to the fullest extent possible” environmental consequences “in every recommendation or report on major federal actions significantly affecting the quality of the human environment.”⁴ Under both the regulations of the President’s Council on Environmental Quality and our own environmental rules, actions are separated into classes that prescribe the level of documentation required in the NEPA process depending on the likelihood of significant environmental effects. Actions that generally have significant effects on the environment require the preparation of a full Environmental Impact Statement.⁵ On the other hand, actions that may have a significant impact ordinarily require the

³ Joint Parties noted that the Montreal, Maine & Atlantic Railway, Limited (MMA), Milford-Bennington Railroad Company, Inc. (MBR), Town of Ayer, Massachusetts (Ayer), and Town of Deerfield, Massachusetts (Deerfield) authorized them to inform the Board that they also support the Joint Parties’ request for oral argument.

⁴ See 42 U.S.C. 4332(2)(C).

⁵ See 40 CFR 1501.4(a)(1); 49 CFR 1105.4(f), 1105.6(a)(1).

preparation of a more limited EA.⁶ Finally, actions whose environmental effects are ordinarily insignificant may be excluded from NEPA review across the board, without a case-by-case review.⁷

After review of the Environmental Appendix, the comments thereto, and consultation by Applicants with SEA, we agree with Applicants and SEA that an EA is warranted. Once the EA is complete, SEA will make it available for public review and comment. Parties will then have 30 days to submit comments to SEA.⁸ After the comment period, SEA will make available a post-EA, addressing the comments and making final recommendations on environmental issues to the Board. The Board will issue a final decision on the Transaction shortly thereafter.

Because an EA will be prepared, the remainder of the procedural schedule adopted in the June 27 Decision is vacated. The Board will issue a final decision on the Transaction as soon as possible after the completion of the environmental review process.

We urge parties to take advantage of the additional time in the procedural schedule to continue negotiations on any unresolved issues, including the proposed assignment of trackage/operating rights to PAS by Springfield Terminal and B&M over rail lines owned by the Massachusetts Bay Transportation Authority (MBTA) and a rail yard owned by the Commonwealth of Massachusetts through EOTPW. Applicants and EOTPW (which represents MBTA in this proceeding) shall submit a joint written report to the Board on the status of any negotiations on or before October 20, 2008.

Finally, we find that the Committee has failed to show that the Board should hold a public hearing in Maine. The Committee has sufficiently documented its concerns regarding PARI and the effects of the Transaction on Maine in its pleadings. Accordingly, the request for a public hearing is denied. Further, we believe that the material issues in this case can be fully presented and addressed through the written record and that oral argument is not necessary. Therefore, the Joint Parties' request for oral argument is denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The remainder of the procedural schedule set forth in the June 27 Decision is vacated to allow the preparation of an Environmental Assessment.

2. Applicants and EOTPW shall file a joint written report on the status of any negotiations on or before October 20, 2008.

⁶ See 40 CFR 1501.4(c); 49 CFR 1105.4(d), 1105.6(b).

⁷ See 40 CFR 1500.4(p), 1501.4(a)(2), 1508.4; 49 CFR 1105.6(c).

⁸ See 49 CFR 1105.10(b).

3. The Committee's request for a public hearing in Maine is denied.
4. The Joint Parties' request for oral argument is denied.
5. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey. Vice Chairman Mulvey dissented in part with a separate expression.

Anne K. Quinlan
Acting Secretary

VICE CHAIRMAN MULVEY, dissenting in part:

I dissent in part from the majority's decision. I would have granted the requests for oral argument because I believe oral argument would have augmented our understanding of the wide-ranging impact of the proposed transaction and its potential regional significance. My partial dissent today follows my July 21, 2008 dissent on the Board's denial of requests to reclassify this transaction from "minor" to "significant." Transactions, such as this one, that are likely to have substantial regional impacts if approved and implemented, and that generate a considerable number of comments from affected parties, deserve to receive the fullest possible scrutiny and to be accorded additional public venues for airing of the relevant issues. As I have previously stated publicly, I believe that the Board should accord the due process permissible under our statute to examine these types of control transactions. This due process includes providing adequate opportunities for stakeholder participation to develop the evidentiary record and to undertake the environmental review process.